

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHYLLIS LOWE and	:	
MILTON LOWE	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	No. 05-5048
	:	
ROCCO PIROZZI and	:	
ANNA MARIE PIROZZI, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

Baylson, J.

April 26, 2006

This is a negligence action that arises out of a slip and fall that occurred in the afternoon of February 15, 2004 in Parkesburg, Pennsylvania (the “Incident”). Milton and Phyllis Lowe (“Plaintiffs”) claim that Phyllis Lowe (“Mrs. Lowe”) tripped and fell over an elevated slab of concrete as she walked along the sidewalk in front of property owned by Rocco and Anna Pirozzi (“Defendants”), resulting in serious injuries to Mrs. Lowe. Presently before the Court is Defendants’ Motion for Summary Judgment (Doc. No. 10). For the reasons that follow, the Court will deny the motion.

I. Background

At the time of the incident, Mrs. Lowe was a seventy-five year old resident of Cherry Hill, New Jersey and the wife of Milton Lowe (“Mr. Lowe”). Defendants are residents of Coatesville, Pennsylvania and the owners of three buildings located at 302-306 Main Street in Parkesburg, Pennsylvania. Defendants operated two eateries out of the buildings – The Old Time Deli (located at 302 Main Street) and Rocco and Anna’s Italian Restaurant (located at 304-306

Main Street) (the “Restaurant”). The restaurants have separate entrances; the main entrance to the Restaurant is located on Main Street.

On the afternoon of February 15, 2004, Plaintiffs traveled with their daughter and son-in-law, Mr. and Mrs. Hoffman, to dine at the Restaurant. Mr. Hoffman parked the car behind 302-306 Main Street. Mrs. Lowe exited the car and began walking behind Mrs. Hoffman along Gay Street toward Main Street. Mr. Lowe and Mr. Hoffman followed behind Mrs. Lowe. When she reached the corner of Gay and Main Streets, Mrs. Lowe turned onto Main Street. As she walked along Main Street, Mrs. Lowe became curious as to how the Restaurant looked inside. Mrs. Lowe spotted a door (the “Door”) next to the Deli and assumed it was part of the Restaurant. She decided to look through the glass portion of the door. Mrs. Lowe moved toward the door. As Mrs. Lowe did so, one of her feet (she does not remember which one) contacted a raised portion of the concrete sidewalk. Mrs. Lowe stumbled a few feet and fell, suffering a fractured left arm and shoulder.

Although Mrs. Lowe did not see the raised portion of concrete either before she fell, she later stated that she had tripped on a “solid impediment” which “felt like an irregularity.” Def. Ex. A at 38. Plaintiffs maintain that no other members of the party, including Mr. Lowe (who was walking behind Mrs. Lowe), actually saw Mrs. Lowe fall. Immediately after the fall, Mr. Lowe observed the raised concrete portion of the sidewalk at Mrs. Lowe’s feet, between the Deli and the Door. At his deposition, Mr. Lowe stated that, at the time: “[i]t was obvious to me she had tripped on the raised piece of pavement, stumbled forward and then hit the raised step.” See Def. Ex. E at 13, 17, 41. Furthermore, Mr. Lowe estimated that the raised concrete portion of the sidewalk was elevated “at least an inch and a half” above the adjacent section of sidewalk. Id.

Plaintiffs returned to the property in May 2004, several months after the Incident, to examine the area and “document” the conditions. According to Plaintiffs, at that point in time, the raised portion of concrete was not at the same height as it had been in February; rather, it was lower and closer to the adjacent concrete). Mrs. Lowe concluded that she was able to identify the cause of her fall and the location of the raised portion of concrete because, based on how and where she fell, “that was the only conceivable spot where it could have happened.” Def. Ex. A at 43.

In addition, Mrs. Lowe testified at her deposition that she had a conversation with Rocco Pirozzi on May 4, 2004. Mrs. Lowe stated that Mr. Pirozzi told the Plaintiffs on that day that there had been a long-standing problem with the block of cement at issue and that he had told “them” to fix it because he feared someone would get hurt. Def. Ex. A at 42-44, 46.

In a recorded interview conducted by a representative of Utica First Insurance Company (and obtained by Plaintiffs during discovery), Anna Pirozzi stated that, prior to the Incident, the Defendants were aware of the fact that a portion of the concrete sidewalk was elevated. Mrs. Pirozzi stated the a contractor had informed the Defendants that due to weather conditions (i.e., ice forming underneath and forcing the concrete up), one block of the sidewalk was about an inch higher than the next. According to Mrs. Pirozzi, the contractor had informed Plaintiffs that they would have to wait until the weather warmed up, at which time the sidewalk would drop back down (which it eventually did). See Plaintiffs’ Ex. 3. In another recorded interview, Gabriel DeFelice, an employee of Defendants who lives in the building which houses the Restaurant, stated that “the blocks rise when cold weather occurs and that this happens every year.” See Plaintiffs’ Ex. 4.

II. Jurisdiction and Legal Standard

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff and Defendant are citizens of different states, and the amount in controversy exceeds \$75,000. See Pl.’s Complaint.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party’s initial burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which

that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

This diversity action is governed by substantive state law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). When ascertaining Pennsylvania law, the decisions of the Pennsylvania Supreme Court are the authoritative source. See State Farm Mut. Automobile Ins. Co. v. Coviello, 233 F.3d 710, 713 (3d Cir. 2000) (citing Connecticut Mut. Life Ins. Co. v. Wyman, 718 F.2d 63, 65 (3d Cir. 1983)). If the Pennsylvania Supreme Court has not yet passed on an issue, then this court will consider the pronouncements of the lower state courts. Id.

III. Discussion

Defendants move for summary judgment on two grounds. First, Defendants argue that Plaintiffs cannot prove, without speculating, what caused Mrs. Lowe to fall. Should the Court find an issue of material fact exists concerning what caused Mrs. Lowe to fall, Defendants also argue that the Plaintiffs’ claims must fail because the condition that Plaintiffs allege caused the Incident was de minimis and, therefore, not actionable as a matter of law. In response, Plaintiffs contend first that evidence concerning causation of the fall is not speculation and must be submitted to a jury. Second, Plaintiffs contend that because the sidewalk defect is not “obviously trivial,” their claim must be submitted to a jury.

A. Causation

It is axiomatic that the mere happening of an accident is not evidence of negligence. Freund v. Hyman, 103 A.2d 658, 659 (Pa. 1958); Swift v. Northeastern Hospital of Philadelphia, 690 A.2d 719, 722 (Pa. 1997). Indeed, to establish a case of negligence, a plaintiff must prove, among other elements, a causal connection between a breach of duty and the resulting injury. Redland Soccer Club, Inc. v. Dep't of the Army of the United States, 55 F.3d 827, 851 (3d Cir. 1995); Morena v. South Hills Health Systems, 462 A.2d 680, 684 n.5 (Pa. 1983). Stated differently, a plaintiff's claim will fail unless she can show that the defendant's conduct was the proximate cause of her injury. Hamil v. Bashline, 392 A.2d 1280, 1284 (Pa. 1978); Cuthbert v. Philadelphia, 209 A.2d 261 (Pa. 1965).

Proximate cause need not be proved by direct evidence; a plaintiff may use circumstantial evidence to do so. Galullo v. Federal Express Corp., 937 F. Supp. 2d 392 (E.D. Pa. 1996). In determining whether a defendant's negligence is the proximate cause of a plaintiff's injury, Pennsylvania has adopted the "substantial factor" test set forth in the Restatement of Torts. Under this test, a defendant's negligent conduct is not the proximate cause of plaintiff's injury unless "the alleged wrongful acts were a substantial factor in bringing about the plaintiff's harm." E.J. Stewart, Inc. v. Aitken Prods., Inc., 607 F. Supp. 883, 889 (E.D. Pa. 1985), aff'd, 779 F.2d 42 (3d Cir. 1986). "What is required is evidence, which means some form of proof; and it must be evidence from which reasonable persons may conclude that, upon the whole, it is more likely that the event was caused by negligence than it was not." Hamil, 392 A.2d at 1285; see also W.P. Keeton et al., Prosser and Keeton on Torts § 39, at 242 (5th ed. 1984); Farnese v. Southeastern Pennsylvania Transp. Auth., 487 A.2d 887, 889 (Pa. Super. 1985) (quoting

Flagiello v. Crilly, 187 A.2d 289 (Pa. 1983)); Smith v. Bell Tel. Co., 397 Pa. 134, 153 A.2d 477 (Pa. 1959) (requiring plaintiff to establish sufficient facts for jury to conclude preponderance favors liability).

Importantly, although the issue of proximate cause is a question of law, the Pennsylvania Supreme Court has instructed that the question of whether a defendant's conduct was a substantial or an insignificant cause of a plaintiff's harm "should not be taken from the jury if the jury may reasonably differ" as to the question. Ozer v. Metromedia Rest. Group, 2005 U.S. Dist. LEXIS 3447, *11-*12 (E.D. Pa. 2005); Ford v. Jeffries, 474 Pa. 588, 379 A.2d 111 (Pa. 1977); see also Redland Soccer Club, 55 F.3d at 827 (proximate cause is traditionally an issue for the jury). Pennsylvania courts also have stated with equal clarity that a jury may draw inferences from the evidence presented to determine whether the facts support a finding of causation. See First v. Zem Zem Temple, 686 A.2d 18, 21 (Pa. Super. Ct. 1996) ("[I]t is enough that there be sufficient facts for the jury to say reasonably that the preponderance favors liability."). Conventional case law instructs that inconsistencies in a witness's testimony should be left to a jury to decide. Strother v. Binkele, 389 A.2d 1186, 1191 (Pa. Super. Ct. 1978)

The Court has reviewed the evidence presented to date in this case. In summary, Plaintiffs offer the following evidence:

1. Mrs. Lowe described the object over which she tripped as a "step in the sidewalk," a "solid impediment" which felt like an "irregularity." Def. Ex. A.
2. Mrs. Lowe stated that the object over which she tripped as not "a rock or something, you know, moveable. It was a solid, like a step that the toe of my sneaker had connected with." Id.

3. On the date of the accident, Milton Lowe saw the position of his wife and the proximity of the raised portion of sidewalk, which he estimated to be elevated at least an inch and a half above adjacent concrete. Def. Ex. E.
4. Milton Lowe stated that “[i]t was obvious” to him that Mrs. Lowe “had tripped on the raised piece of pavement” and stumbled forward. Id.
5. Upon return to the scene of the accident, Mrs. Lowe easily identified the spot of the fall, stating “it was a no brainer.”
6. On that same day, Defendant Rocco Pirozzi admitted to Plaintiffs the existence of a defect in the sidewalk at the location of Mrs. Lowe’s fall, stating that the concrete raised up one to two inches over the adjacent sidewalk.
7. Interviews obtained in discovery reveal that, prior to the Incident, Defendants were specifically aware of the defect (i.e., concrete elevated at least one inch) at the location where Mrs. Lowe fell.

Because the Court is obliged to consider the evidence in a light most favorable to Plaintiffs, the Court is not persuaded that Defendants are correct when they assert that the record is devoid of evidence that Mrs. Lowe tripped over the elevated concrete portion of the sidewalk. In the present case, there is both testimony and evidence that the raised concrete portion of the sidewalk caused Mrs. Lowe to trip and fall. There is direct and circumstantial evidence that the concrete sidewalk was raised in the area that Mrs. Lowe tripped, and Mrs. Lowe referred to having tripped over a solid step or irregularity. Further, Mr. Lowe testified that he witnessed the elevated concrete and that such was the obvious cause of Mrs. Lowe’s fall. The Court acknowledges that this cited evidence may be disputed by Defendants, but where there is a

debate as to the evidence, the issue of proximate cause should be decided by a jury. Because a reasonable juror could, based on the jury's receipt of the evidence presented, distinguish among and sift through the evidence to infer that the raised concrete sidewalk did both factually and proximately cause Mrs. Ozer to fall, summary judgment is not appropriate in this case.¹

B. Triviality

The Defendants also assert that even if there is sufficient evidence from which causation might be inferred, no liability should lie against them because the alleged defect is so slight as to be deemed trivial (i.e., de minimis). In support of this proposition, Defendants note several Pennsylvania cases which provide examples of cases where “landowners were determined not responsible for incidents involving elevations, depressions and/or other irregularities ranging

¹ The few cases that Defendants contend dictate a different outcome at this stage present markedly different factual scenarios in which the plaintiffs offered plainly inadequate evidence or relied on obvious speculation to select one of multiple possible proximate causes. For example, in Dubois v. Wilkes-Barre, 189 A.2d 166 (Pa. 1963), the plaintiff merely speculated that an alleged accumulation of a “foreign” liquid substance caused her to slip; the Pennsylvania Supreme Court recognized that the plaintiff had not adduced sufficient corroborative evidence as to what actually caused her to slip. As another example, in Gallulo v. Federal Express Corporation, the Plaintiff alleged that she slipped on something “wet” when she stepped out of her front door. However, the plaintiff could not recall seeing what she slipped on, and could only recall that she felt something wet under her foot before she fell. The record also reflected that there were other items near the doorway, such as leaves and an old rug, that could have caused the plaintiff to slip. In concluding that the plaintiff had not presented sufficient evidence of proximate causation, the court reasoned that there were several other possible causes of the fall, and the plaintiff had produced no evidence that it was the envelope, as opposed to the other items, that caused her to fall. Such is not the case here. Plaintiffs have identified a specific cause of Mrs. Lowe's fall, and Defendants have not identified any competing proximate causes.

Defendants also cite Cuthbert v. City of Philadelphia, 209 A.2d 261, 263 (Pa. 1965), for the proposition that a plaintiff may not return to the scene of an accident at a later date and search the accident scene for circumstantial evidence of a proximate cause. However, in the recent Ozer decision, Judge Pratter correctly observed that there are more recent cases from the Pennsylvania Superior Court which suggest that proximate cause may be inferred from wholly circumstantial evidence and, where there are conflicts in a witness's testimony, the issue should be decided by a jury. See Ozer, 2005 U.S. Dist. LEXIS 3447 at *17 n.8 (citing Strother, 389 A.2d at 1191).

from 1.5 to 4 inches.” Def. Br. at 11.

Under Pennsylvania law, a business owner is obligated to (1) keep the premises in a “reasonably safe condition” and (2) to warn an invitee or business visitor of latent defects or dangers which it knows exist or in the exercise of reasonable care should have known. See Ozer, 2005 U.S. Dist. LEXIS 3447 at *20 (citing Watkins v. Sharon Aerie Fraternal Order of Eagles, 223 A.2d 742 (Pa. 1966); Restatement (Second) of Torts § 341A (1965)).²

While business owners are obliged to maintain pavement and sidewalks in a reasonably safe condition, there is no duty to insure that a pedestrian is protected from any and all accidents. See Magennis v. City of Pittsburgh, 42 A.2d 449, 450 (Pa. 1945); Davis v. Potter, 17 A.2d 338, 339 (Pa. 1941). If a court concludes that a defect is so trivial that no reasonable juror could impose liability, summary judgment can be appropriate. See Davis, 17 A.2d at 339 (finding alleged defect “so trifling that . . . the court, as a matter of law, is bound to hold that there was no negligence”). However, unless a defect is obviously trivial, its gravity should be a fact determined in light of the circumstances of the particular case. See Massman v. City of Philadelphia, 241 A.2d 921, 923 (Pa. 1968) (finding that circumstances required question of triviality of defect should be decided by jury); Breskin v. 535 Fifth Avenue, 113 A.2d 316, 318 (Pa. 1955) (noting that “except where the defect is obviously trivial” question as to whether defect was sufficient to render liability should be decided by jury).

As Defendants indicate, examples of defects which have been found to be so obviously

² A business visitor is considered “a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings.” Restatement (Second) of Torts § 332(3) (1965).

Defendants have not argued that Plaintiffs were not invitees or business visitors.

trivial as to preclude imposing liability include: (1) a one and one-half inch difference between the levels of two abutting curbstones, McGlenn v. City of Philadelphia, 186 A. 747 (Pa. 1936); (2) a one and one-half inch space between the adjoining ends of flagstones at a street crossing, Newell v. City of Pittsburgh, 123 A. 768 (Pa. 1924); (3) an uneven, rough, unpaved step between a curb and sidewalk, that was two to four inches below the sidewalk level, Foster v. West View Borough, 195 A. 82 (Pa. 1937); (4) a manhole cover that projected two inches above the surface of the street, Harrison v. City of Pittsburgh, 44 A.2d 273 (Pa. 1945); (5) a hole that was one and one-eighth inches below the level of pavement and was in a twelve-by-fifteen inch area, Magennis v. City of Pittsburgh, 42 A.2d 449 (Pa. 1945); and (6) a saucer-like depression of one and one-half inches involving a water valve housing, Plischke v. Dormont Borough, 33 A.2d 480 (1942).³

In the instant case, the evidence is that Mr. Lowe observed the elevated concrete portion of the sidewalk and described it as raised “at least an inch and a half.” Def. Ex. E. Furthermore, Mr. Pirozzi admitted to Plaintiffs that the sidewalk “tended to rise one to two inches” every time there were certain weather conditions. Id. Moreover, the elevated portion of the sidewalk is located along the path customers walk when moving from the parking area to the Restaurant entrance.

After careful consideration of this question and pertinent caselaw, the Court finds there to

³ As Judge Pratter noted in Ozer, not all of these cases cited were decided as a matter of law by the court, but rather were appeals from trials in which a jury concluded as to liability. Of the cases cited, Foster and McGlenn were decided as a matter of law (nonsuit) by the trial court. Harrison and Newell were appeals from judgment non obstante veredicto, and Magennis was an appeal from a trial court’s refusal to grant judgment non obstante veredicto. Thus, only two of the five cases were decided at the summary judgment stage.

be a sufficient dispute of fact with respect to whether the alleged defect was trivial. As in Ozer, the issue of triviality of the defect makes summary judgment close but difficult. However, considering the facts and evidence in a light most favorable to Plaintiffs, the Court finds that from (1) the height of the elevation; (2) the proximity of the elevated portion of concrete sidewalk to the customers' path to the entrance to the Restaurant; and (3) the seasonal regularity with which the defect arose, a jury could find the defect to be less than "obviously" trivial. Stated differently, applying Judge Pratter's persuasive reasoning from Ozer, the Court is unable to conclude that the alleged defect was so "obviously" trivial as to require a grant of summary judgment. Therefore, the question as to whether the alleged defect was obviously trivial in the context of the conditions confronted by Mrs. Lowe is one best left for the jury to decide. See Ozer, 2005 U.S. Dist. LEXIS 3447 at *25-*27; see also Breskin, supra (holding that unless a defect is obviously trivial, "what constitutes a defect sufficient to render the [possessor of land] liable must be determined [by a jury] in the light of circumstances of the particular case"); Smith v. SEPTA, 707 A.2d 604, 610 (Pa. Commw. Ct. 1998) (where crack was one and one-half to two inches high at its worst, the question of whether it is sufficient to render a city liable is for the jury) (citing Aloia v. City of Washington, 361 Pa. 620, 65 A.2d 685 (1949)); Gosha v. City of Philadelphia, 30 Pa. D&C 3d 190 (Phila. Ct. Comm. Pl. 1982) (in holding that a jury may conclude that there should be responsibility if the defect is large enough to catch a person's heel during a normal step and to cause serious injury, stating "an injured plaintiff may not be denied relief simply because some persons might say a hole in a sidewalk is small") (citing Henn v. Pittsburgh, 22 A.2d 742 (Pa. 1941)).

IV. Conclusion

For the reasons discussed above, the Court finds that, although this is indeed a close case for summary judgment purposes, there are sufficient disputes of material fact between the parties to preclude granting Defendant's Motion for Summary Judgment.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHYLLIS LOWE and	:	
MILTON LOWE	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	No. 05-5048
	:	
ROCCO PIROZZI et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 26th day of April, 2006, after careful consideration of the parties' briefing and oral argument, it is hereby ORDERED that Defendant's Motion for Summary Judgment (Doc. No. 10) is DENIED.

BY THE COURT:

/s/ MICHAEL M. BAYLSON
MICHAEL M. BAYLSON, U.S.D.J.